STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2008
v	No. 277509 Tuscola Circuit Court
MAXIMO SANDOVAL, JR., Defendant-Appellant.	LC No. 06-009907-FC

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of second-degree criminal sexual conduct (CSC) involving personal injury, MCL 750.520c(1)(f).[1] He was sentenced as a fourth-habitual offender, MCL 769.12, to concurrent prison terms of 20 to 60 years for each conviction. We affirm defendant's convictions, but remand for resentencing.

I. Facts

In the summer of 2005, defendant, then a 25 year-old male, knocked on the victim's window at 2 a.m. The victim, then a 13 year-old girl who is developmentally delayed, knew the defendant because his parents lived in her neighborhood and because she worked with defendant at a local farm. When the victim heard the knocking, she went to the door and opened it. When she saw defendant, she went outside. Defendant and the victim went to his parents' house and the two entered the back of defendant's mother's van, where they kissed. Defendant then touched the victim's breasts and her vagina and the victim told him to stop. Defendant refused and called the victim derogatory names. The victim tried to leave the van, but defendant pulled her back into the van. Defendant, having pulled his pants down, then grabbed the victim's head and forced her to perform fellatio on him twice. The victim told defendant to stop, but he refused and continued to push her head down. Sometime during these events, the victim tried to push defendant off her and defendant tried to choke her. The victim got out of the van and ran home. Once the victim returned home, the victim's mother called the police and the victim submitted to a sexual assault examination and rape kit. The examiner found saliva on the

[1] Defendant was acquitted of two additional counts of first-degree CSC involving personal injury, MCL 750.520b(1)(f).

victim's chest, which was collected and sent for DNA testing. Defendant's DNA matched the DNA collected from the victim's chest.

Defendant was arrested on August 22, 2006. Defendant was then incarcerated on parole detainer and remained incarcerated during the pendency of this matter. Trial was set for February 14, 2006. However, on February 13, 2006 the charges were dismissed without prejudice because the DNA analysis had not yet been completed. The prosecutor refiled the charges on May 12, 2006 and defendant was arraigned and "rearrested" on June 5, 2006. After a pretrial in October 2006, the matter was brought to trial on January 9, 2007. At trial, defendant presented an alibi defense, alleging that he was sleeping at his sister's house at the time of the event. The victim testified according to the facts above. The victim also indicated that she has been angry, embarrassed, and afraid as a result of the incident and that she sought counseling after the incident.

II. Sufficiency of the Evidence

A. Standard of Review

We review the sufficiency of the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

B. Analysis

Defendant argues that there was insufficient evidence to support his second-degree CSC convictions. We disagree. Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt of the crimes charged. *People v Tombs*, 260 Mich App 201, 206-207; 679 NW2d 77 (2003). Defendant was convicted of three counts of second-degree CSC involving personal injury, MCL 750.520c(1)(f), which prohibits a person from engaging in sexual contact with another person by force or coercion and causing personal injury. Force or coercion includes actual physical force or threat of force. MCL 750.520b(1)(f). Personal injury is defined to include mental anguish, for example by requiring psychiatric care or an inability to carry on normal life. MCL 750.520a(n); *People v Petrella*, 424 Mich 221, 270-271; 380 NW2d 11 (1985).

Here, the victim testified that defendant touched both her breasts and vagina against her will and, when she objected, defendant called her names and continued to touch her. The victim stated that she tried to leave defendant's van, but defendant pulled her back inside. The victim testified that she has been angry, afraid, and embarrassed since the assault, and began going to counseling shortly after the incident. The victim's mother also testified that the victim does not go outside as much as she did before and has to be encouraged to leave the house. This evidence, when viewed in a light most favorable to the prosecution, was sufficient for the jury to find beyond a reasonable doubt that defendant committed three separate acts of sexual contact, accomplished by force or coercion, and that caused the victim to suffer mental anguish.

Defendant's arguments that the DNA test may be unreliable or that his DNA may have been deposited innocently, that the victim was not credible and had a motive to lie, and that other reasons may have necessitated the victim's counseling, are all related to the weight of the

evidence and the credibility of witnesses, which are within the exclusive province of the jury. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). We will not resolve those issues anew on appeal. *Id.* Accordingly, defendant's sufficiency of the evidence argument fails.

III. Sentencing

A. Standards of Review

Constitutional challenges under the Sixth Amendment are reviewed de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). We also review de novo a sentencing court's application and interpretation of the legislative sentencing guidelines. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). However, we review for an abuse of discretion a sentencing court's scoring of offense variables and we review for clear error its factual findings. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). We will uphold the sentencing court's scoring of the guidelines if there is any record evidence to support the scoring. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). We also review the trial court's decision to depart from the sentencing guidelines for an abuse of discretion. *People v Buehler*, 477 Mich 18, 23-24; 727 NW2d 127 (2007).

B. *Blakely* Violation

Defendant contends that the trial court's scoring of certain offense variables on the basis of facts neither found by the jury, nor admitted by himself, violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which a sentencing judge could increase the defendant's maximum sentence based on facts not found by the jury or admitted by the defendant. Defendant concedes that our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which the statute sets defendant's maximum sentence and the sentencing guidelines affect only the minimum sentence. *Drohan*, *supra* at 159-164. Defendant's argument lacks merit.

C. Scoring of Offense Variables 4, 8, 10, and 11

Defendant argues that the trial court improperly scored offense variables (OV) 4, 8, 10, and 11. We disagree.

The trial court scored ten points for OV 4. Offense variable 4 permits a sentencing court to score 10 points if the incident caused a victim "serious psychological injury requiring professional treatment." MCL 777.34(1)(a). That the victim in this case sought counseling after the incident was sufficient to support the trial court's ten-point score.

The trial court scored 15 points for OV 8, which allows a sentencing court to award 15 points if a defendant "asported" the victim to another place of greater danger. MCL 777.38(1)(a). The evidence showed that defendant persuaded the victim to accompany him inside his mother's van at 2 a.m., where she was secluded. This evidence supports the trial court's 15-point score for OV 8. Although defendant argues that there was no evidence that force was used to accomplish this movement, there is no requirement that the movement be forcible. *Spanke*, *supra* at 647-648. The movement may be voluntary. *Id.*

The trial court scored ten points for OV 10, under which a court may allot 10 points if a defendant exploited a vulnerable victim. MCL 777.40(1)(b). Here, the victim was 13 years of age and developmentally delayed, while defendant was 25 years of age. This evidence indicates that the victim was susceptible to persuasion and temptation due to her age and mental status, and that defendant exploited that vulnerability for his own purposes. MCL 777.40(3)(b) and (c). Therefore, defendant's argument that there was no evidence of the victim's vulnerability must fail.

Lastly, the trial court scored 50 points for OV 11, which permits a sentencing court, in certain circumstances, to score 50 points if two or more sexual penetrations occurred. MCL 777.41(a). The victim's testimony that defendant forced her to perform fellatio twice almost immediately after he touched both her breasts and vagina supported the trial court's 50-point score for OV 11. Penetrations, like those in this case, that occur in "the same place, under the same set of circumstances, and during the same course of conduct" are properly scored as penetrations arising out of the sentencing offense. *People v Mutchie*, 251 Mich App 273, 276-277; 650 NW2d 733 (2002); MCL 777.41(2)(a). Thus, defendant's argument that there is no connection between his conviction offenses and the alleged acts of fellatio lacks merit.

Defendant also argues that his acquittal of the two counts of first-degree CSC should preclude the trial court from considering the victim's testimony for purposes of scoring OV 11. Defendant's position is incorrect. "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence," *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), which in some instances will include evidence of other criminal activities even though a defendant was acquitted of the charges, *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Thus, in this case, simply because the prosecution failed to prove beyond a reasonable doubt the two first-degree CSC counts does not prevent the court from considering the evidence when sentencing the defendant.

Finally, we also cannot agree with defendant's contention that scoring of OV 11 violates double-jeopardy because it exposed him to more punishment than the Legislature intended. Our Supreme Court has held that a sentencing court's consideration of facts related to an offense of which a defendant is acquitted does not constitute a double jeopardy violation. *People v Shavers*, 448 Mich 389, 392-393; 531 NW2d 165 (1995). Accordingly, after our review of the record, we conclude that evidence supported the court's scoring of OV 4, 8, 10, and 11 and the court did not abuse its discretion.

D. Departure from the Sentencing Guidelines Range

Defendant asserts that the trial court erred when it departed from the sentencing guidelines range. We agree. A trial court must impose a minimum sentence within the appropriate guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines range if it "has a substantial and compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3); *Babcock*, *supra* at 260. Failure to state any substantial and compelling reasons invalidates a sentence that departs from the minimum guidelines range. *Buehler*, *supra* at 28.

Defendant's minimum sentence range was 58 to 228 months. The trial court sentenced defendant to a minimum of 240 months without stating substantial and compelling reasons on the

record justifying the departure. While the trial court referred to defendant's habitual offender and parolee status, these factors are already accounted for in the guidelines. See MCL 777.21(3)(c); MCL 777.56(1)(c). A court "shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). No such finding was made in this case. Accordingly, we vacate defendant's sentences and remand for resentencing. On remand, the trial court must sentence defendant within the sentencing guidelines range, or articulate on the record a substantial and compelling reason for departing from that range and for the extent of the departure.[2]

IV. Defendant's Standard 4 Brief

A. Standards of Review

Defendant raises several issues in a pro per supplemental brief, including: whether defendant was deprived of his right to a speedy trial under the 180-day rule and the United States and Michigan Constitutions, whether the trial court improperly relied upon his prior convictions when it sentenced him as a fourth-habitual offender, and whether the prosecutor engaged in misconduct. Whether the 180-day rule applies in this matter is a question of law we review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995). We also review de novo constitutional questions, including whether a defendant is deprived of his right to a speedy trial. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). For preserved claims of prosecutorial misconduct, we review the prosecutor's conduct in context to determine whether the defendant was deprived of a fair trial. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). Unpreserved claims of misconduct, as well as defendant's unpreserved attacks on his prior convictions, are reviewed for plain error affecting defendant's substantial rights. *Id*. at 645; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Pretrial Delay

1. 180-Day Rule

Defendant argues that the charges against him should have been dismissed due to a violation of the statutory 180-day rule. We disagree. Under the 180-day rule, an incarcerated defendant must be brought to trial within 180 days of the date that the Department of Corrections provides the prosecutor with written notice and request for final disposition. MCL 780.131. To trigger the rule, the Department of Corrections *must* send written notice and a request for final disposition to the prosecutor, in the precise manner provided in the statute. *Williams*, *supra* at

[2] Defendant's argument that the case must be reassigned to another judge on remand is unavailing. There is no reason to believe that the original judge would have difficulty reexamining his views or that reassignment is advisable to preserve the appearance of justice. See *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998). In addition, because we remand for resentencing, we find it unnecessary for us to consider defendant's argument that his sentence is disproportionate to his offense.

254-256. Defendant concedes that "[i]t is certainly true that in this particular case the department of corrections did not give the notice required by the statute." Therefore, the 180-day period was never triggered and this argument lacks merit.[3]

2. Speedy Trial

Defendant next asserts that his right to a speedy trial was violated. Again, we disagree. The right to a speedy trial is guaranteed under US Const, Am VI and Const 1963, art 1, § 20. "The time for judging whether the right to a speedy trial has been violated runs from the date of the defendant's arrest." *Williams*, *supra* at 261. In determining whether the right to a speedy trial has been violated, we must balance the *Barker*[4] factors: "(1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Id*. at 261-262. Prejudice is presumed after an 18-month delay. *Id*. at 262.

We first consider the length of delay. Defendant was initially arrested on August 22, 2005, but the charges were dismissed without prejudice nearly six months later on February 13, 2006. Although defendant remained incarcerated on a parole violation, he could not be deprived of his right to a speedy trial during this post-dismissal incarceration because no charges were pending on which he could be brought to trial. *People v Wickham*, 200 Mich App 106, 110-111; 503 NW2d 701 (1993). New charges were filed against defendant on May 12, 2006, and defendant was "rearrested" on those new charges on June 5, 2006. Trial began on January 9, 2007. The total length of delay on this present charge is seven months. If we include the time elapsed during the pendency of the first charge, six months, then the total time elapsed is 13 months, which falls short of the 18-month delay. Thus, this factor weighs against defendant and defendant has the burden of showing prejudice. *People v Walker*, 276 Mich App 528, 541; 741 NW2d 843 (2007), vacated on other grounds 480 Mich 1059 (2008).

Turning to the reasons for delay, is clear that the first six-month delay is attributable to the prosecution because of its failure to timely obtain the DNA evidence. As to the remaining seven-month delay, it appears from the record that the only possible explanation is docket congestion. The court set the January 9, 2007 trial date on August 30, 2006, less than a week after defendant was arraigned on the charges. Motion proceedings occurred thereafter, but defendant's trial was held as scheduled. Delay due to docket congestion is attributable to the prosecution. *Williams*, *supra* at 263. However, when congestion is the only reason for delay, we are to "assign[] [it] only minimal weight in determining whether a defendant was denied a

[3] Defendant's argument that MCR 6.004(D) is unconstitutional is also unavailing. Specifically, defendant posits that this court rule, which is based on the 180-day rule statute, MCL 780.131, deprives a defendant of his constitutional right to a speedy trial because it shifts the burden of giving notice to a defendant when the Department of Corrections fails to provide the prosecutor notice. However, defendant fails to explain exactly how this court rule deprives him of his constitutional rights. Under the circumstances, we consider defendant's argument abandoned. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

[4] *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972).

speedy trial." *Id*. (quotation marks and citation omitted). Accordingly, we conclude that this factor weighs slightly in defendant's favor.

Under the third factor we must consider circumstances surrounding defendant's assertion of the right. Defendant attempted to assert his right to a speedy trial both before and during trial. There is no indication that defendant waited to assert his right until the case could be dismissed due to prejudice. We conclude that this factor weighs in defendant's favor.

The last factor we consider is prejudice. There are two types of prejudice we must consider: prejudice to the person and prejudice to the defense. *Wickham*, *supra* at 112. Defendant asserts that his person was prejudiced because he suffered anxiety and concern due to his pretrial incarceration. This conclusory claim lacks merit. Defendant presents no evidence in support of this claim and, in any case, defendant would have remained incarcerated due to his parole violation. Defendant's person was not prejudiced.

In addition, defendant argues that his defense was prejudiced because the prosecutor delayed in disclosing the results of the DNA tests, thereby preventing him from obtaining an expert to repeat the analysis. However, the record reveals that defendant sought the original evidence upon which the DNA results were based in September 2006. On December 11, 2006 the trial court ordered that the prosecution produce that evidence within 10 days. We fail to see how these discovery motions prejudiced defendant by somehow denying him his right to a speedy trial. Had defendant needed more time for his expert to analyze the results, he could have sought an adjournment. Defendant also contends that two of his four alibi witnesses became unavailable during the delay. No record evidence supports the claim that these witnesses were unavailable, nor does defendant explain how their alleged unavailability was caused by the delay. Such general allegations are insufficient to establish a violation of a defendant's right to a speedy trial. *Walker*, *supra* at 544-545. Defendant fails to show prejudice to his defense. Accordingly we conclude that defendant's Sixth Amendment right to a speedy trial was violated.

C. Collateral Attack on Prior Convictions

Defendant argues that several of his prior convictions were improperly used to establish his habitual offender status and to score the sentencing guidelines. We find defendant's argument to be without merit. Because defendant did not object below to the use of any of his prior convictions, defendant must show plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

First, defendant argues that his August 1999 misdemeanor conviction for OUIL cannot be considered for scoring or enhancement purposes because he was not advised of his right to an attorney or represented by counsel. A defendant charged of a misdemeanor is entitled to counsel only if "actually imprisoned." *People v Reichenbach*, 459 Mich 109, 120; 587 NW2d 1 (1998). Our Supreme Court has held that such lawful uncounseled convictions can be used for sentence enhancement purposes. *Id*. at 124. Here, defendant's misdemeanor resulted in six months' probation. Thus, defendant had no right to counsel and his 1999 conviction was properly used for enhancement.

Second, defendant argues that his two felony drug convictions in December 2000 may be counted as only a single conviction for scoring and enhancement purposes because they arose

from the same criminal transaction. However, our Supreme Court has squarely rejected this argument in *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), when it held that the Legislature intended sentencing courts to count each felony conviction separately irregardless of whether the felonies arose from the same incident. *Id.* at 91.

Third, defendant argues that his May 2002 conviction for OUIL and his October 2003 convictions for OUIL and assaulting a police officer are constitutionally infirm because he was not properly advised of his appellate rights. We cannot agree. The affidavit on which defendant relies indicates that the local court's practice where defendant was convicted was to hand an advice of rights form to the defendant and that the form would only be placed in the court file if the defendant completed and returned the form. As such, the affidavit does not establish that defendant was not advised of his appellate rights. Defendant wrongly presumes, without citing to any authority, that failure to preserve a copy of the form somehow invalidates his convictions.

Fourth, defendant argues that his November 1999 misdemeanor convictions, and his May 2002 and October 2003 felony convictions, which all resulted from guilty pleas, may not be used for enhancement or scoring purposes because he was not informed of his appellate rights at sentencing. Defendant relies on *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), in which the United States Supreme Court held that the Due Process and Equal Protection Clauses require the appointment of appellate counsel for indigent defendants seeking review of their plea-based convictions to first-tier review in the Michigan Court of Appeals, even when the appeal is discretionary rather than as of right. *Id*. at 609-610. *Halbert* obligates the state to provide appointed appellate counsel to indigent defendants on their plea-based convictions. *Halbert* does not specifically address how or in what form a defendant must be informed of his or her appellate rights. Even if *Halbert* provided some basis on which to attack his convictions, e.g., if defendant had sought review and requested, but was denied, court-appointed appellate counsel,[5] defendant's argument would still fail because *Halbert* does not apply retroactively to the facts of this case. See *People v Houlihan*, 474 Mich 958, 960; 706 NW2d 731 (2005) (Markman, J., dissenting); *Simmons v Kapture*, 516 F3d 450, 451 (CA 6, 2008). Defendant has not shown that these prior convictions are constitutionally invalid under *Halbert*. For all of the foregoing reasons, defendant has failed to show plain error in the use of his prior convictions to establish his habitual offender status or to score the sentencing guidelines.

D. Prosecutorial Misconduct

Defendant asserts that plaintiff's counsel engaged in prosecutorial misconduct that deprived him of a fair trial.[6] This Court recognizes that "[a] prosecutor may not argue the effect

[5] Nothing in the record indicates that defendant sought to appeal his plea-based convictions or requested and was denied appellate counsel. Nor does defendant claim that any error occurred during the plea-taking proceedings that might invalidate the convictions.

[6] Defendant objected when the prosecutor elicited testimony concerning the victim's developmental delays, but did not object to any of the other conduct that he now challenges on appeal. Therefore, only the claim that received an objection at trial is preserved. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006).

of testimony that was not entered into evidence at trial[,] . . . [but he may argue] the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case." *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Moreover, a prosecutor need not phrase his arguments in the blandest possible terms, as the prosecutor is an advocate and is charged with the duty to vigorously advocate his case. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

In this case, the prosecutor's theory was that the much older defendant took advantage of a naive and vulnerable 13 year-old developmentally disabled girl, lured her out of her house in the middle of the night, convinced her to accompany him to his mother's van voluntarily, and then sexually assaulted her. At certain points during closing argument, the prosecutor referred to defendant as a "predator" and the victim as "prey." Defendant contends that the remarks concerning the victim's and defendant's relative ages and labeling defendant a "predator" and the victim "prey" were improper civic duty arguments, appeals to the jury's sympathy, were assumed facts not in evidence, and denigrated defendant. After a review of the record, we conclude that the prosecutor's remarks were based on the evidence and are proper reasonable inferences. *Fisher*, *supra* at 156. While the terms "predator" and "prey" are undoubtedly colorful terms, the prosecutor used these terms only once during closing arguments and such use falls short of improperly inflaming the jury. *Marji*, *supra* at 538. Moreover, because the prosecutor based his statements on evidence properly admitted at trial, we fail to see how any of the prosecutor's statements injected issues broader than defendant's guilt or innocence into the proceedings, contrary to defendant's contention. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). The prosecutor's conduct did not deprive defendant of a fair trial, nor did they constitute plain error affecting defendant's substantial rights.

Defendant also asserts that the prosecutor improperly elicited irrelevant testimony regarding the victim's developmental delay and made improper statements that defendant was lying. However, evidence of the victim's developmental delays was relevant to explain her conduct on the night of the offense, to show coercion, and to her credibility as a witness. In addition, a prosecutor may argue from the facts that a defendant is not worthy of belief, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), and therefore it was proper for the prosecutor to argue that defendant was untruthful in light of the contradictory evidence on the record.

Finally, we find unavailing defendant's argument that he was deprived of a fair trial because the prosecutor misstated the law when he stated that all parties, including the victim, were entitled to a fair trial. The court remedied any possible prejudice when it instructed the jury to base its verdict exclusively on the evidence presented at trial, not the attorney's arguments. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

For these reason, we find no error, plain or otherwise, based on the prosecutor's conduct at trial. Accordingly, we cannot agree with defendant's argument that the cumulative effect of the prosecutor's alleged misconduct warrants reversal. Having found no error on any single issue, defendant is not entitled to a new trial on this basis. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

V. Ineffective Assistance of Counsel

Defendant, through both appellate counsel and in propria persona, argues that to the extent that any issues raised on appeal were not preserved, trial counsel was ineffective for not preserving them below. We disagree. The unpreserved issues raised on appeal include the use of defendant's prior convictions for enhancement and scoring purposes, and all but one of the claims of prosecutorial misconduct.[7] We have considered each of defendant's unpreserved issues and concluded that they lack merit. Because any motion or objection would have been futile, defense counsel was not ineffective for failing to act. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray

[7] The various sentencing issues raised by appellate counsel were preserved by a timely motion for resentencing. Defendant's speedy trial and 180-day rule arguments were also preserved because they were raised below. There is no preservation requirement for defendant's sufficiency of the evidence argument.